56TH CONGRESS, 1st Session. SENATE. DOCUMENT No. 249.

MRS. ANNIE BIRDSALL, ADMINISTRATRIX.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

TRANSMITTING,

IN RESPONSE TO RESOLUTION OF THE SENATE OF MARCH 12, 1900, A REPORT OF THE SECRETARY OF STATE, WITH COPIES OF CORRESPONDENCE, IN REGARD TO THE PROTEST AND CLAIM OF MRS. ANNIE BIRDSALL, ADMINISTRATRIX OF THE ESTATE OF JOHN BIRDSALL, DECEASED.

MARCH 28, 1900.—Read, referred to the Committee on Commerce, and ordered to be printed.

To the Senate:

I transmit herewith a report from the Secretary of State in response to the resolution of the Senate of March 12, 1900, calling for copies of correspondence in regard to the protest and claim of Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased.

WILLIAM MCKINLEY.

EXECUTIVE MANSION,
Washington, March 28, 1900.

THE PRESIDENT:

In response to the resolution of the Senate of March 12, 1900, requesting the Secretary of State "to furnish the Senate with copies of the correspondence between the Department of State and Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, or her attorney, and also copies of the correspondence between the Department of State and the Attorney-General in regard to the protest and claim of the said administratrix," the undersigned, the Secretary of State, has the honor to lay before the President the papers called for.

Respectfully submitted.

JOHN HAY.

DEPARTMENT OF STATE,
Washington, March 27, 1900.

S. Doc. 25——27

Mr. Kennedy to the Secretary of State.

DECEMBER 15, 1899.

SIR: The Supreme Court of the United States having affirmed the decree of the Court of Claims in the case of the United States against La Abra Silver Mining Company et al., I beg to invite the attention of the Department, and of the President, through the Department, to the following statement which is made as the basis of a protest and claim on behalf of Mrs. Annie Birdsall of Glencove, N. Y., against the return of so much of the undistributed portion of La Abra award as belongs to her in her capacity of administratrix as aforesaid, under an assignment to her deceased husband from the said company, dated May 18, 1889.

1. By the act of Congress approved December 28, 1892 (27 Stat., 409), the Attorney-General of the United States was authorized and directed to bring a suit "against La Abra Silver Mining Company, its successors and assigns, and all persons making any claim to the award or any part thereof in the act mentioned;" and it was further provided in the said act that "any defendant to such suit who can not be found in the District of Columbia shall be notified and required to appear in such suit by publication, as the court may direct, in accordance with law, as applicable to cases in equity."

2. In the eighteenth paragraph of Mr. Attorney-General's bill of complaint he prayed for discovery as follows:

> Your orator is informed and believes, and thereupon says, that persons other than the said defendants, and whose names are at present unknown to your orator, pretend to have some right or claim to or interest in said award on the claim of said defendant company and in the moneys so as aforesaid remaining in the possession of your orator. And your orator prays discovery from each and every of the said defendants as to whether any and what other person or persons than the said defendants claim any and what right to or interest in the said award or the said moneys; and whether such other persons, if any, make such claims in their own right, or in some, and what, representative capacity; and that such other persons, if any, when discovered, may be made parties defendant hereto, with apt and proper words to charge them, respectively.

3. The said La Abra Company, in the eighteenth paragraph of its answer, made discovery of Mrs. Birdsall's interest in the said award as follows:

> This defendant, in answer to the eighteenth paragraph of the plaintiff's bill of complaint praying discovery, alleges that on or about the 18th day of May, 1889, it assigned, for a good and sufficient consideration, an interest to the amount of thirty thousand dollars in the said award to one John Birdsall, now deceased, and that, as this defendant is informed and verily believes, his administratrix, one Annie Birdsall, of Glencove, in the county of Queens, State of New York, claims the benefit of the said assignment.

4. No subpœna to answer was issued to Mrs. Birdsall or served upon her, and she was not notified or required to appear in the said suit by publication, as in the said act of Congress provided.

5. Not having been served with process or notified by publication, as in the said act of Congress required, although her interest was disclosed by La Abra Silver Mining Company in its answer, in response to the complainant's prayer for discovery, as aforesaid, the said Mrs. Annie Birdsall is not bound by the decree, and now claims the amount assigned to her deceased husband by the said company as aforesaid, to wit, the sum of $30,000; and she hereby protests against the return of the said

amount to the Government of Mexico or any disposition of the same other than payment to her in her capacity of administratrix as aforesaid.

I have the honor to be, sir, your obedient servant,

CRAMMOND KENNEDY,
Attorney for Mrs. Annie Birdsall,
Administratrix of the Estate of John Birdsall, deceased.

The Secretary of State to the Attorney-General.

DEPARTMENT OF STATE,
Washington, December 20, 1899.

SIR: I have the honor to inclose herewith a copy of a letter from Mr. Crammond Kennedy, attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, protesting against the return to the Government of Mexico of $30,000, to which that estate is entitled out of the undistributed portion of the La Abra award; and I beg to request that you will furnish me with a report of the facts in the case, together with an expression of your opinion thereon, in order that the Department may be able to answer Mr. Kennedy's letter.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

The Attorney-General to the Secretary of State.

OFFICE OF THE ATTORNEY-GENERAL,
Washington, D. C., January 12, 1900.

SIR: Referring to your letter of December 20, 1899, relative to the protest of Mr. Crammond Kennedy, attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, against returning to the Government of Mexico $30,000 of the undistributed portion of the La Abra award, I beg to hand you herewith report of William A. Maury, esq., special attorney of the United States in this matter, and, in accordance with the facts therein stated and the views therein expressed, I advise you that the protest is without support in law, and may be safely disregarded by you.

Very respectfully,

JOHN W. GRIGGS,
Attorney-General.

[Inclosure.]

Mr. Maury to the Attorney-General.

1505 PENNSYLVANIA AVENUE,
Washington, January 8, 1900.

SIR: Your letter of December 27 ultimo, calling my attention to "A letter from the Secretary of State, with protest and claim of Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased," and requesting to be furnished "with such a report of the facts and your (my) opinion thereon as may properly answer the request of the Secretary of State," has received my consideration, and I have the honor to submit the following statement and opinion in reply:

It appears that the decedent, John Birdsall, as assignee of La Abra Silver Mining Company, claimed an interest of $30,000 in the award in favor of the said company, made by the Mixed Commission established by the treaty of July 4, 1868, between the United States and the Republic of Mexico.

At the time the bill was filed by the United States against La Abra Silver Mining Company and others in the Court of Claims, under the act of Congress of December 28, 1892 (27 Stat., 409), the Attorney-General was informed and believed that, in addition to the parties named in the bill, there were others, to him unknown, who pretended to have interests in the said award, as appears by paragraph XVIII of the bill, which is as follows:

> Your orator is informed and believes, and thereupon says, that persons other than the said defendants, and whose names are at present unknown to your orator, pretend to have some right or claim to, or interest in, said award on the claim of said defendant company and in the moneys so as aforesaid remaining in the possession of your orator. And your orator prays discovery from each and every of the said defendants as to whether any and what other person or persons than the said defendants claim any and what right to or interest in the said award or the said moneys; and whether such other persons, if any, make such claim in their own right, or in some, and what, representative capacity; and that such other persons, if any, when discovered, may be made parties defendant hereto, with apt and proper words to charge them, respectively.

In response to the discovery thus called for, La Abra Silver Mining Company set forth in its answer—

> that on or about the 18th day of May, 1889, it assigned, for a good and sufficient consideration, an interest to the amount of $30,000 in the said award to one John Birdsall, now deceased, and that, as this defendant is informed and verily believes, his administratrix, one Annie Birdsall, of Glencove, in the county of Queens, State of New York, claims the benefit of the said assignment.

It is now set up by the counsel of Annie Birdsall, administratrix, etc., that no subpœna to answer was issued to or served upon her, and that "she was not notified or required to appear in the said suit by publication, as in the said act of Congress provided," meaning the said act of December 28, 1892.

Upon this state of facts a protest has been lodged with the Secretary of State, in the behalf of the said Annie Birdsall, administratrix, etc., to the effect that she is not bound by the decree in said cause, not having been made a party thereto as it is pretended, and that she is entitled to receive the amount of the said assignment out of the undistributed money paid by Mexico under the said award, and that, to that extent, the said money should not be returned to Mexico.

The ground of this extraordinary pretension seems to be the requirement of the first section of the said act of 1892, that—

> Any defendant to such suit who can not be found in the District of Columbia shall be notified and required to appear in such suit by publication as the court may direct, in accordance with law, as applicable to cases in equity.

The jurisdiction conferred on the Court of Claims by the said act of 1892 was, say the Supreme Court of the United States in the above suit, on appeal, such "as may be ordinarily exercised by courts of equity, as distinguished from courts of law;" and, consequently, that court considered the case upon the entire evidence, and not upon the usual findings of fact in appeals from the Court of Claims.

It will be found that, in addition to La Abra Silver Mining Company, 19 persons were made parties defendant to the bill. They all claimed interests in the said award, and the money paid thereunder by Mexico,

some of the said interests being for large sums of money, and the whole of them amounting to a considerable part of the undistributed fund.

It appears from the bill that the substantial purpose in making these claimants parties to the bill was to secure the Government a respite, by the process of injunction, from the harassments and annoyances consequent upon their "persistent demands," followed up, as they were, in some instances, by suits, to enforce them.

It further appears from the bill that there is no allegation of fact therein upon which it could have been decreed that the assignee, John Birdsall, was implicated in the fraud and the false and fraudulent practices charged in the bill to have been employed in obtaining the said award by the defendant, La Abra Silver Mining Company; and the assignment to Birdsall having been admitted in the answer of the company, it is difficult to see what practical end would have been subserved by obtaining an order of publication against his administratrix.

Beyond doubt she knew of the pendency of the suit, and if she had wished to become a party could readily have done so by the usual means of a petition.

Having stood aloof from the suit, while it was being defended by La Abra Silver Mining Company and the 19 assignees named in the bill, all claiming under the award and all represented by Mr. Crammond Kennedy and Messrs. Shellabarger & Wilson (see stipulation, hereto annexed), it is rather late in the day for the administratrix of John Birdsall to expect to elude justice by intercepting the return to Mexico of a part of the money paid by that Government under an award which has been twice judicially denounced as the result of fraud and perjury.

But the protest and claim now set up by Birdsall's administratrix are made in disregard of an established principle of the procedure of courts of equity, which governed the said suit, the Court of Claims and the Supreme Court having held that the act of Congress of December 28, 1892, intended that any suit to be brought thereunder should be a suit in equity, with all the incidents of such a suit.

The principle referred to is that of representation, where, in certain cases, a decree is held to be binding on persons not named in the bill as parties, but who at the same time have a common interest with those who are named as parties, which interest the latter are taken to have fully represented in the suit.

Mr. Justice Story, in his work on Equity Pleadings, has treated this subject very fully, and (section 97) reduces to a classification the instances in which representation is permissible. This classification was adopted and acted on by the Supreme Court in the case of Smith *v.* Swormstedt (16 How., 275, 302).

Its first division relates to cases "where the question is one of a common or general interest and one or more sue or defend for the benefit of the whole."

It would appear that the suit in question came within this division, it being a suit against certain named defendants and certain persons who were unknown and whose interests must necessarily be represented by those made parties by name.

There being a common interest in sustaining the award between the known and the unknown parties, jurisdiction vested as to the latter as well as to the former, and nothing happening afterwards could divest that jurisdiction in any particular. (Simmons *v.* Saul, 138 U. S., 439, 454, and cases there cited.)

It was for the complainant to say whether Birdsall's administratrix should be made a party to the bill by some form of citation; not, however, for the purpose of getting jurisdiction, but for the purpose of evoking discovery; and the complainant having elected not to make her a party by name, the only alternative was for her to come into the suit in the usual way—by petition, as we have said.

The Supreme Court pressed the principle of representation quite as far in the case of United States *v.* Old Settlers (148 U. S., 427, 480), where it was held that certain absent persons had been sufficiently represented by parties who, however, had not brought themselves "as strictly within the rule, * * * as they should." The court, having satisfied itself that the common interest had been properly represented, had no difficulty in holding the absent persons bound by what had been done in the suit, and so declined to consider whether the representation was technically proper or not.

That authority is decisive of the matter submitted by the Secretary of State. There is not the smallest ground to question the sufficiency of the representation of the Birdsall interest in the said suit, nor is it claimed in her protest that she could have added a jot or tittle to the defense made by La Abra Company and the other defendants. Her position is purely technical and can not be allowed to overbear the claims of substantial justice.

The position I have taken is also strongly supported by the New York case of McKenzie *v.* L'Amoureux (11 Barb., 516).

There is nothing in the act of December 28, 1892, which militates against the doctrine of representation. Its requirement that publication shall be made against defendants not to be found in the District of Columbia evidently refers to the parties originally named in the bill as to whom process should be returned not found; and the act expressly provides that the publication contemplated shall be such "as the court may direct, in accordance with law, as applicable to cases in equity," which is strong to show that Congress had in view that the contemplated litigation should be conducted in strict subjection to the rules of equity procedure.

If, now, the administratrix of Birdsall is not bound by the decree entered in said suit, it is manifest that no unknown claimant under the award is bound either, and that the United States has no alternative but to institute a new suit, which is absurd.

It results, therefore, that the protest of Birdsall's administratrix is without support in law and may be safely disregarded.

I have the honor to be, sir, yours, very respectfully,

WM. A. MAURY,
Special Assistant to Attorney-General.

Hon. JOHN W. GRIGGS,
Attorney-General.

STIPULATION REFERRED TO IN THE AFOREGOING OPINION.

In the Court of Claims. The United States, plaintiff, *v.* La Abra Silver Mining Company et al., defendants. In equity. No. 17917.

It is hereby stipulated and agreed this 9th day of May, 1894, by and between the parties to this suit that the defendant, La Abra Silver Mining Company, shall plead or answer on or before the 1st day of June next ensuing; that the plea or answer of the said company shall be taken as and for the plea or answer of such of the other

defendants as shall not plead or answer on his, her, or their own behalf, and that the United States shall not enter judgment by default for want of a plea or answer against any of the defendants who shall not so plead or answer unless and until judgment shall be entered in favor of the United States in this suit by this court or, in case of appeal, by the Supreme Court of the United States, provided that if no such appeal shall be taken, judgment shall be entered by default, on the expiration of the time limited for taking such appeal against such defendants as shall not have so pleaded or answered after judgment shall have been entered in this court against the said company.

ROBERT B. LINES,
Special Assistant to the Attorney-General.
SHELLABARGER & WILSON and
CRAMMOND KENNEDY,
Of Counsel for La Abra Company and other Defendants.

Filed May 10, 1894.

The Secretary of State to the Attorney-General.

DEPARTMENT OF STATE,
Washington, January 16, 1900.

SIR: I have the honor to acknowledge receipt of your letter of the 12th instant, purporting to inclose the report of Mr. William A. Maury, special attorney of the United States in the matter of the La Abra award, and to inform you that Mr. Maury's report was not inclosed with your letter, as stated.

Requesting that you will forward it as soon as practicable, I have the honor to be, sir,

Your obedient servant,

JOHN HAY.

Mr. Hill to Mr. Kennedy.

DEPARTMENT OF STATE,
Washington, January 22, 1900.

SIR: Referring to your protest, as attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, against returning to the Government of Mexico $30,000 of the undistributed portion of the La Abra award, I inclose herewith copy of a letter from the Attorney-General. The report of Mr. Maury, mentioned in Mr. Griggs's letter, has not reached the Department. It has requested its transmittal.

I am, sir, your obedient servant,

DAVID J. HILL,
Assistant Secretary.

Mr. Clay to Mr. Michael.

JANUARY 26, 1900.

SIR: I send you a report of William A. Maury, special attorney of the United States in La Abra case, which should have accompanied the letter of the 12th instant addressed to the Secretary of State by the Attorney-General, and is now forwarded because of the Secretary's letter of the 16th instant stating that it had not been received.

Very respectfully,

CECIL CLAY, *Chief Clerk.*

The CHIEF CLERK, DEPARTMENT OF STATE.

Mr. Kennedy to the Secretary of State.

JANUARY 23, 1900.

SIR: I beg to acknowledge the receipt of Dr. Hill's note of the 22d instant, inclosing a copy of Mr. Attorney-General's of the 12th instant, advising the Department that in accordance with the facts stated and the views expressed in a report made by Mr. Maury, special attorney of the United States in this matter, the protest submitted by me on behalf of Mrs. Annie Birdsall is without support in law and may be safely disregarded.

I should be greatly obliged to the Department if it would furnish me with a copy of Mr. Maury's report when received.

For the information of the Department I beg to state that an order staying the mandate has been made by the Supreme Court and that a motion for a rehearing will be made in this case.

I have the honor to be, sir, your obedient servant,

CRAMMOND KENNEDY.

Mr. Hill to Mr. Kennedy.

DEPARTMENT OF STATE,
Washington, January 30, 1900.

SIR: Referring to my letter of the 22d instant in relation to your protest, as attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, against returning to the Government of Mexico $30,000 of the undistributed portion of the La Abra award, I inclose herewith for your information a copy of the report of Special Attorney William A. Maury, referred to in my letter.

I am, sir, your obedient servant,

DAVID J. HILL,
Assistant Secretary.

Mr. Kennedy to the Secretary of State.

THE UNITED STATES *v.* LA ABRA SILVER MINING COMPANY AND OTHERS.

PROTEST AND CLAIM OF MRS. ANNIE BIRDSALL, AS ADMINISTRATRIX OF THE ESTATE OF JOHN BIRDSALL, DECEASED, LATE OF THE CITY OF NEW YORK.

FEBRUARY 13, 1900.

SIR: Through the courtesy of the Department I received, with Dr. Hill's note of the 30th ultimo, a copy of the report of special attorney William A. Maury to the Attorney-General in this matter. I now beg to submit the following observations upon Mr. Maury's report, in the hope that you will deem them of sufficient importance to transmit them to the Attorney-General for his consideration.

The act of December 28, 1892, under which this suit is brought, authorizes and directs the Attorney-General—

to bring a suit or suits in the name of the United States in the Court of Claims against La Abra Silver Mining Company, its successors and assigns, and all persons making any claim to the award or any part thereof * * * to determine whether the award * * * was obtained as to the whole sum included therein or as to any part thereof by fraud * * * on the part of the said company or its agents, attorneys,

or assigns; and, in case it be so determined, to bar and foreclose all claim in law or equity on the part of said * * * company, its legal representatives, or assigns, to the money, or any such part thereof received from the Republic of Mexico for or on account of such award; and any defendant to such suit who can not be found in the District of Columbia shall be notified and required to appear in such suit by publication as the court may direct, in accordance with law, as applicable to cases in equity.

It thus appears that the "assigns" were to be sued, as well as the company. The duty of suing the company was no more obligatory on the Attorney-General under the act than the duty of suing the company's "assigns." The company might have assigned all its interest in the award, and it might not have been necessary to make it a defendant as a party pecuniarily interested. The provision for notifying defendants outside of the District by publication was equally mandatory.

The Attorney-General was informed through the Department of State in regard to certain assignments executed by the company to various persons, and he made those persons parties defendant by name, and notified such of them as were outside the District, by publication, to appear and plead as required by the act. But in case there might be other assignees of the company he prayed discovery in his bill, as stated in my protest, and as restated by Mr. Maury, "from each and every of the defendants as to whether any and what other person or persons than the said defendants claim any and what right to or interest in the said award or the said money."

The object of this prayer, as stated in the bill, was "that such persons, if any, when discovered may be made parties defendant hereto with apt and proper words to charge them, respectively."

The bill in which this discovery was prayed was itself an amended bill, amendments having been made to bring in other parties by name who had not been named as defendants in the original bill. And those persons were necessary parties under the act, because they were the company's "assigns."

The original bill was filed March 30, 1893, and subpœnas to answer were issued to various defendants who were assignees of the company. On the 8th of July, 1893, the Attorney-General moved to amend his bill by adding the names of Crammond Kennedy and Edward M. Harrington as defendants. This motion was granted, and subpœnas to answer were issued accordingly to these persons. On July 11, 1893, returns were made by the bailiff that certain of the defendants named in the bill could not be found in the District, whereupon (as appears from the general docket of the Court of Claims) an order was issued by Mr. Chief Justice Richardson, "pursuant to Statutes at Large, chapter 137, 1875," that such defendants should appear and plead; and a certified copy of the said order was delivered to the Attorney-General for publication in the Washington Post. Such publication was accordingly made in the said newspaper, and a copy of the order as so printed was mailed to each of such defendants at their last known post-office address.

Now, according to Mr. Maury's present contention, all this was unnecessary, although expressly required by the jurisdictional act, for if it was unnecessary in the case of one known assignee of the company it was unnecessary in the cases of all other known assignees of the company under the act. Indeed, Mr. Maury's argument seeks to apply a modification of the general rule—that every person directly interested must be made a party to the case of a known assignee, made

known in answer to a prayer for discovery—although such modification applies only to interested persons who are unknown or whose numbers are so great that they can not, without much inconvenience, be brought before the court.

Now, as already observed, Mr. Attorney-General obtained an order of publication from Mr. Chief Justice Richardson issued, as noted in the general docket of the Court of Claims, "pursuant to Statutes at Large, chapter 137, 1875." It will be remembered that publication was to be made under the jurisdictional act (supra), "as the court may direct, in accordance with law, as applicable to cases in equity." The statute referred to in the entry of the aforesaid order provides (section 8) for substituted service "in any suit commenced in any circuit court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought;" and it also provides:

> In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the direction contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to a hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district.

It thus appears that the fact that personal service can not be made upon certain necessary or proper defendants is not to prevent the court from taking jurisdiction and determining the cause, so as to conclude the parties actually served with process.

But the same section of this act further provides:

> That any defendant or defendants not actually personally notified, as above provided, may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law. (18 Stats., 472, 473.)

This statute is referred to in section 737, Revised Statutes, which reads as follows:

> When there are several defendants in any suit at law or in equity and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it, but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing.

In this connection see also rules 47 and 48 of the Rules of Practice for Courts of Equity of the United States. Mr. Maury seems to ignore the controlling fact that the jurisdictional act expressly requires that the company's "assigns" shall be made parties to the suit, and that this requirement is in accordance with the general rule as laid down by the Supreme Court in Williams *v.* Bankhead (19 Wall., 563), in which it was said:

> Where the person will be directly affected by a decree he is an indispensable party unless the parties are too numerous to be brought before the court.

But in the case we are discussing there was no such difficulty (I assume for the moment that the special act is not mandatory), for, as already stated, the interest of Mrs. Birdsall under the assignment from the company to her husband had been disclosed to the Attorney-General in response to his own prayer for discovery, and he had in other similar instances made the proper motion to amend his bill, and process had been issued to the additional parties accordingly.

In Williams *v.* Bankhead (supra), the court also said:

> The general rule as to parties in chancery is that all ought to be made parties who are interested in the controversy, in order that there may be an end of litigation.

This was a case quite analagous to Mrs. Birdsall's, for toward the close of the opinion the court said, as ground for reversing the decree below:

> This is not a case of mere personal liability. It concerns the disposal of a specific fund, in which the widow claims an interest.

In the case of Smith *v.* Swormsted (16 How., 288), to which Mr. Maury refers, and which was not brought, like this case, under a special act, there were "some fifteen hundred persons represented by the complainant and over double that number by the defendants" (303).

But Congress assumed in La Abra case that all the company's assigns could be reached, and directed the Attorney-General to bring suit against them accordingly. Mr. Maury tries to escape from this predicament by citing a modification of the general rule, which can not be applied to this case, because (*a*) the assignee was not "unknown;" and (*b*) she could readily have been made a party defendant and notified by publication, as required by the act.

Mr. Maury also says:

> It was for the complainant to say whether Birdsall's administratrix should be made a party to the bill by some form of citation; not, however, for the purpose of getting jurisdiction, but for the purpose of evoking discovery; and the complainant, having elected not to make her a party by name, the only alternative was for her to come into the suit in the usual way, by petition, as we have said.

But it should be observed (*a*) that the complainant, under the act, had no right to elect whether "to make her a party by name," but was as much bound to make her, or any other of the known "assigns" of the company, a defendant as to make the company itself a defendant; and (*b*) that being advised, as she was, that the suit was brought in violation of her rights, she was under no obligation to come into it by petition or in any other way.

Mr. Maury also says:

> If, now, the administratrix of Birdsall is not bound by the decree entered in said suit, it is manifest that no unknown claimant under the award is bound either, and that the United States has no alternative but to institute a new suit, which is absurd.

To this it may be said once more that the question we are discussing is not whether any unknown claimant under the award is bound, but whether one of the known "assigns" of the company, whom the Attorney-General deliberately refrained from making a party, in face of the plain and peremptory requirements of the act, is bound by the decree. It is also to be observed that when the United States becomes a litigant it is subject to the laws the same as a citizen, and if it does not con-

form to the law it would be "absurd" to say that it has any "alternative" that the citizen would not have under similar circumstances.

Mr. Maury also says:

> Nor is it claimed in her protest that she could have added a jot or tittle to the defense made by La Abra company and the other defendants.

But she does not need to make any such claim. It is enough that the Attorney-General, for reasons sufficient to himself, "elected not to make her a party by name," or to serve her with process, although he was informed, under oath, in response to his own prayer for discovery, that she was one of the company's "assigns."

It may be said, however, that Mrs. Birdsall's intestate having acquired his interest when he did, she can now set up that he acquired it not only on faith of the treaty of July 4, 1868, but also on faith of the decision of the President of the United States, rendered on the 5th of September, 1879, under the act of June, 1878, to the effect that the company has a valid claim against Mexico, and that any further investigation must be confined to the question of damages. She can also claim that he acquired his interest on faith of the action of the Senate of the United States in refusing its assent to the proposed convention for reopening the award. It is also to be observed that she may have evidence in defense of her rights other than that which was produced by the respondents in the original suit.

Even if Mrs. Birdsall had been made a party defendant and had been notified by publication, but had not appeared, it might be questioned whether she would have been bound by the decree, for it was held by the Supreme Court of the United States in Pennoyer *v.* Neff (95 U. S., 714), that "where the entire object of the action is to determine the personal rights and obligations of the defendants—that is, where the suit is merely in personam, constructive service in this form upon a nonresident is ineffectual for any purpose." (See also Gheely *v.* Clayton (110 U. S., 701), to the same effect.)

Mr. Maury is mistaken as to the stipulation annexed to his report when he says that the company and "the 19 assignees named in the bill" were "All represented by Mr. Crammond Kennedy and Messrs. Shellabarger & Wilson." These attorneys did not represent the "19 assignees" and did not sign the stipulation on their behalf, but simply as "counsel for La Abra Company and other defendants;" and it was doubtless the purpose of Mr. Lines, who was at that time special assistant to the Attorney-General, to obtain the signatures of the attorneys for the other defendants, whose names may be found in the general docket of the Court of Claims.

Mr. Maury says, truly, that the Supreme Court of the United States decided that this was a suit in equity and that the facts, as well as the law, were taken up by the company's appeal; but Mr. Maury characterized that view, which was presented to the court by the undersigned and his associates, as a "fundamental misconception" of the jurisdictional act just as he characterizes this protest of Mrs. Birdsall's as "an extraordinary pretension." It is respectfully submitted that Mr. Maury is just as much mistaken when he says that Mrs. Birdsall's protest may be safely disregarded, under the jurisdictional act, as he was when he argued to the Supreme Court that that same act did not give it jurisdiction of the facts.

I have the honor to be, sir, your obedient servant,

CRAMMOND KENNEDY.

Mr. Hill to Mr. Kennedy.

DEPARTMENT OF STATE,
Washington, February 26, 1900.

SIR: I have to acknowledge the receipt of your letter of the 13th instant submitting some observations by you on the report of Mr. William A. Maury, special attorney of the United States in the matter of your protest as attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, against returning to the Government of Mexico $30,000 of the undistributed portion of the La Abra award.

In reply I have to inform you that a copy of your letter has been sent to the Attorney-General for his consideration.

I am, sir, your obedient servant,

DAVID J. HILL,
Assistant Secretary.

The Secretary of State to the Attorney-General.

DEPARTMENT OF STATE,
Washington, February 26, 1900.

SIR: Referring to your letter of the 12th ultimo inclosing a report by Mr. William A. Maury, special attorney of the United States in the matter of the protest of Mr. Crammond Kennedy, attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, against returning to the Government of Mexico $30,000 of the undistributed portion of the La Abra award, I have the honor to inclose herewith, for your consideration, a copy of a letter from Mr. Kennedy, submitting some observations by him on Mr. Maury's report.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

The Attorney-General to the Secretary of State.

DEPARTMENT OF JUSTICE,
Washington, D. C., March 6, 1900.

SIR: I have the honor to acknowledge the receipt of your letter of the 26th ultimo, inclosing a copy of a letter from Mr. Crammond Kennedy, attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, growing out of La Abra Case, submitting some observations by him on the report of Mr. William A. Maury, special attorney of the United States.

I have carefully considered these observations, and have submitted them to Mr. Maury, and I am clear in the opinion that there is nothing in them which would justify a reopening of the discussion, and thus cause unncessary delay and inconvenience to the Government of Mexico.

Respectfully,

JOHN W. GRIGGS,
Attorney-General.

Mr. Richards to the Secretary of State.

DEPARTMENT OF JUSTICE,
Washington, March 9, 1900.

SIR: I have the honor to inform you that the petition for a rehearing, which was submitted to the Supreme Court of the United States by the appellant in the case of La Abra Silver Mining Company *v.* United States was denied by that court on February 26, that the mandate thereupon issued and was filed in the Court of Claims, and the proper order entered therein on February 28, 1900.

Respectfully,

J. K. RICHARDS,
Acting Attorney-General.

Mr. Kennedy to the Secretary of State.

WASHINGTON, *March 9, 1900.*

SIR: I beg to inclose for the information of the President and the Department a copy of the joint resolution which was introduced by Senator Platt, of New York, in the Senate of the United States, and referred to the Committee on the Judiciary on the 5th instant, for the relief of Annie Birdsall, administratrix of the estate of John Birdsall, deceased.

You will observe that in the opinion of the Supreme Court of the United States, affirming that of the Court of Claims to the same effect in this case (citations from both of which opinions are given on pages 2 and 3 of the joint resolution), La Abra award is still in full force and effect "between the Governments concerned," and it is for the President to determine in his discretion as the constitutional administrator of the foreign affairs of the United States what disposition to make of the funds on hand appertaining to the award, and when to dispose of them. The act of Congress authorizes, but does not direct or even request, the President to return the funds to Mexico, and the decree of the court simply bars and forecloses the claims of the individual defendants in the suit upon the undistributed portion of the award. Thus the act and the decree united to leave the President with a free hand in the premises.

The inclosed resolution requests the President "to retain the said sum of thirty thousand dollars until the rights and claim of the said Annie Birdsall as administratrix and widow of John Birdsall, deceased, in respect of the said award, shall have been judicially determined as prescribed in the said act of Congress." This is a government of law and the legal rights of a citizen can not be confiscated or annulled arbitrarily in any case, still less in the teeth of a special statute which the Supreme Court of the United States has said is and is to be regarded as a legislative recognition of the legal rights of the claimants.

The joint resolution also gives notice to the President of "defenses and evidence in support of the said award * * * not submitted by the defendants to the court in the said suit," which evidence may affect the whole case and sustain a motion for a new trial.

As further proceedings remain to be taken in the Weil case, it would seem proper under the circumstances to postpone a settlement with Mexico until both of these cases, which, although so unlike, have been associated and sometimes confused with each other since 1876, may be finally disposed of together. This would give the Mexican Government no just cause of complaint, and might prevent the consummation of the gravest injustice.

As Congress, according to this decision of the Supreme Court, has plenary power over the award, which still stands intact as aforesaid, and as Congress may be trusted to insist that the Attorney-General shall observe the jurisdictional statute which he has disregarded, and now proposes to disregard again, the amount claimed by Mrs. Birdsall should be retained in any event till action shall have been taken by Congress upon the joint resolution.

There are reasons of state, as well as reasons growing out of the legal situation created by the jurisdictional act and the decree of the Court of Claims, why the President might well insist that Congress should take the responsibility of directing the return of the funds in question by a legislative act, which he could approve or disapprove as he might then deem proper. I should be glad of an opportunity to submit these reasons for your consideration, and I beg again to suggest that under existing circumstances no part of La Abra award should be returned to the Mexican Government until the legal situation shall have been carefully examined and the Weil case shall have been finally decided.

I have, etc., CRAMMOND KENNEDY.

The Secretary of State to the Attorney-General.

DEPARTMENT OF STATE,
Washington, March 12, 1900.

SIR: Referring to previous correspondence in relation to the protest of Mr. Crammond Kennedy, attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, against returning to the Government of Mexico $30,000 of the undistributed portion of the La Abra award, I have the honor to inclose herewith for your information and request your advice thereon, a copy of a letter from Mr. Kennedy, inclosing a copy of a joint resolution that was introduced by Senator Platt, of New York, in the Senate, on the 5th instant, for the relief of Annie Birdsall, administratrix as aforesaid.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

Mr. Hill to Mr. Kennedy.

DEPARTMENT OF STATE,
Washington, March 13, 1900.

SIR: Referring to your letter of the 13th ultimo in relation to your protest as attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, against returning to the Government of Mexico $30,000 of the undistributed portion of the La Abra award,

I inclose herewith for your information a copy of a letter from the Attorney-General in which he says that he has carefully considered the observations made in your letter, and has submitted them to Mr. Maury, and that he is clear in the opinion that there is nothing in them that would justify a reopening of the discussion, and thus cause unnecessary delay and inconvenience to the Government of Mexico.

Your letter of the 9th instant inclosing a copy of the joint resolution introduced in the Senate, on the 5th instant, for the relief of Mrs. Annie Birdsall, administratrix as aforesaid, has also come to hand, and is receiving the Department's consideration.

I am, sir, your obedient servant,

DAVID J. HILL,
Assistant Secretary.

The Attorney-General to the Secretary of State.

OFFICE OF THE ATTORNEY-GENERAL,
Washington, D. C., March 15, 1900.

SIR: Acknowledging the receipt of your communication of the 12th instant with which you transmitted to me a copy of a letter from Mr. Crammond Kennedy, attorney for Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, and a copy of the joint resolution for the relief of said administratrix, introduced in the Senate March 5, 1900, I have the honor to say that I referred your letter with said inclosures to Hon. William A. Maury, special counsel in charge of the case of the United States against the La Abra Silver Mining Company, and herewith inclose a copy of his reply.

I concur in the conclusion reached by him, that the President may safely pay the whole La Abra fund to the Government of Mexico, notwithstanding the introduction in the Senate of the joint resolution referred to.

Very respectfully, JOHN W. GRIGGS,
Attorney-General.

[Inclosure.]

Mr. Maury to the Attorney-General.

WASHINGTON, *March 15, 1900.*

SIR: Your letter of March 13 instant, with a copy of one from the Secretary of State, bringing to your attention a copy of a letter to him from Mr. Crammond Kennedy, attorney for Mrs. Annie Birdsall, administratrix of John Birdsall, deceased, and a copy of a joint resolution introduced in the Senate of the United States on March 5 instant, having for its purpose to request the President of the United States to withhold from the Government of Mexico the amount of the Birdsall claim of $30,000 on La Abra fund until the validity of said claim shall have been judicially ascertained.

The decisive answer to this attempt to secure the interference of Congress is afforded by the decree of the Court of Claims in the case of the United States *v.* La Abra Silver Mining Company and others, and the opinion of the Supreme Court of the United States in support of its affirmance of that decree.

The decree of the Court of Claims is as follows:

The court finding from the evidence that the award made by the United States and Mexican Mixed Commission in respect to the claim of said company was obtained as to the whole sum included therein by fraud effectuated by means of false swearing and other false and fraudulent practices on the part of said company and its agents, it is therefore hereby ordered, adjudged, and decreed that all claims in law and equity on the part of the said company, its legal representatives and assigns, be forever barred and foreclosed of all claim to the money received from the Republic of Mexico for or on account of such award.

In affirming that decree the Supreme Court say, as the result of their opinion:

Our conclusion is that the question stated in the act of 1892—whether the award in question "was obtained as to the whole sum included therein or as to any part thereof by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the said La Abra Silver Mining Company, or its agents, attorneys, or assigns"—must be answered in the affirmative as to the whole sum included in the award.

These courts having both solemnly adjudged that the whole award was the result of fraud and perjury, and that the Abra company, its legal representatives and assigns, should be forever barred and foreclosed in respect of the money received from the Republic of Mexico, it is not easy to comprehend how Birdsall's assignment can rise higher than the tainted source from which it flows. If the award was void as to La Abra company, it must be void as to all assignees claiming interests in it under that company.

This being the attitude of the judicial department of the Government, after the fullest consideration, it would seem to follow that Congress can not interfere in a matter over which the judicial department has claimed and exercised a plenary jurisdiction without invading the independence of that department, its coordinate and coequal.

Say the Supreme Court in the Sinking-Fund cases (99 U. S., p. 718):

One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

For these reasons, which appear satisfactory, I am respectfully of opinion that the President may safely pay the whole Abra fund to the Government of Mexico, notwithstanding the pendency in the Senate of the joint resolution in question.

I have the honor to be, sir, your most obedient servant,

WM. A. MAURY,
Special Assistant to the Attorney-General.

The Secretary of State to the Attorney-General.

DEPARTMENT OF STATE,
Washington, March 16, 1900.

SIR: I have the honor to acknowledge the receipt of your letter of the 15th instant in relation to the repayment of the whole La Abra fund to the Government of Mexico, notwithstanding the introduction in the Senate of the joint resolution communicated to you by the Department in its letter of the 12th instant.

Since that resolution was introduced the Senate has passed the resolution which is inclosed herewith. Considering the grounds of your decision, stated in your letter, it would seem to follow that the La Abra fund should be repaid to Mexico in full, even though both Houses might pass the joint resolution heretofore communicated to you. But inasmuch as the resolution herewith inclosed calls for all correspondence in the case, this resolution is respectfully referred to you for your opinion whether, notwithstanding its passage by the Senate, and the pendency of the joint resolution, the Department should, in the repayment of said money, decide independently of whatever action may be taked by either or both Houses of Congress under the pending resolution and repay the said fund to Mexico without further delay.

I have the honor to be, sir, your obedient servant,

JOHN HAY.

The Attorney-General to the Secretary of State.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., March 17, 1900.

SIR: I beg to acknowledge the receipt of your letter of the 16th instant, inclosing copy of a resolution passed by the Senate, requesting you to furnish the Senate with copies of correspondence between the State Department and Mrs. Annie Birdsall, administratrix of the estate of John Birdsall, deceased, her attorney, etc.

You ask whether in view of the passage of this resolution by the Senate, and the pendency of the joint resolution referred to in the previous correspondence between us, the State Department should, in the repayment of said money, decide independently of whatever action may be taken by either or both Houses of Congress under the pending resolution and repay the said fund to Mexico without further delay.

In reply I have the honor to advise you that, in accordance with my previous decisions, the claim of Mrs. Birdsall is not well founded; that she is estopped by the judgment of the court; that nothing submitted by her entitles her to the reservation of any part of the La Abra fund, and that you are lawfully authorized to pay the whole of that fund to Mexico without further delay.

Nothing so far done by Congress in anywise alters the law or leads me to modify the advice I have given you. Inasmuch as it does not appear whether Congress will take any action upon the subject, nor what such action will be, I can only reiterate the advice which I have heretofore given you.

As to the effect of the joint resolution now pending in Congress, or any other possible resolution by that body, it is not proper for me to express an opinion at this time, as there is nothing in existence upon which such an opinion can be based, and it would be entirely tentative and provisional.

Very respectfully,

JOHN W. GRIGGS,
Attorney-General.

Mr. Kennedy to the Secretary of State.

619 FOURTEENTH STREET NW.,
Washington, D. C., March 20, 1900.

SIR: I have to thank the Department for Dr. Hill's note of the 13th, inclosing a copy of the Attorney-General's opinion of the 6th instant, in which he says that he has carefully considered the observations submitted in my letter of the 26th ultimo, and that, in his judgment, "there is nothing in them which would justify a reopening of the discussion, and thus cause unnecessary delay and inconvenience to the Mexican Government."

Doubtless the wishes and convenience of the Mexican Government should receive due consideration, but I am sure that you will not allow them to interfere with a proper regard for the rights of my client, who has appealed to you and to Congress for the protection to which it seems to me she is lawfully entitled.

I am also indebted to the Department for copies of the Attorney-General's note of the 15th instant, and Mr. Maury's opinion of the same date, dealing with my letter of the 9th instant and with the joint resolution introduced in the Senate and referred to the Judiciary Committee on the 5th instant for Mrs. Birdsall's relief.

The Senate, as you are aware, adopted a resolution on the 12th instant requesting you, Mr. Secretary, to furnish it with copies of the correspondence between the Department and Mrs. Birdsall, or her attorney, and between the Department and the Attorney-General, in regard to her claim as administratrix of her deceased husband. I beg that you will include this letter in your response to that request, and that if anything further is received from the Attorney-General on the subject you will have the goodness to furnish me with a copy of it, and afford me an opportunity to reply before you transmit the papers to the Senate, so that the Judiciary Committee may have the correspondence entire.

I do not need to say to you that the practice has been for the Department to suspend action affecting a pending claim in regard to which either branch of Congress, by the passage of a resolution, requests information.

Mr. Maury cites the decree of the Court of Claims and the language of the Supreme Court in affirming it as a sufficient answer to Mrs. Birdsall's protest and claim. Of course, I do not deny that this decree was made and affirmed. But I do deny that it binds my client. And I do not see how Maury can object to my "attempt to secure the interference of Congress" when the decree to which he refers and the suit in which it was rendered would have had no existence but for such so-called "interference." The power of Congress to interfere with the execution of the award has been asserted by the Supreme Court in this case in the most positive, clear, and comprehensive terms. The court has held that no judicial investigation—no suit or decree—as preliminary to such interference was necessary; that Congress could have dealt with the award as it chose, without the intervention of the judiciary.

> Undoubtedly (says the court) Congress, having in view the honor of the Government and the relations of this country with Mexico, could have determined the whole question of fraud for itself, and by a statute, approved by the President, or which, being disapproved by him, was passed by the requisite constitutional vote, have directed the return to Mexico, the other party to the award, of such money as had been paid into the hands of the Secretary of State.

Not only, in the opinion of the Supreme Court of the United States, was there no need of prior judicial proceedings to impeach the award, but if the executive department had differed from the legislative department in regard to the requirements of "the honor of the Government and the relations of this country with Mexico"—so far as the award was concerned—Congress could have taken the whole affair out of the President's hands and into its own, by passing an act over his veto.

In his contention that Congress can not interfere for Mrs. Birdsall's relief at this stage of the proceedings, Mr. Maury relies on the doctrine that this is a government of limited powers, apportioned by the Constitution among three equal, coordinate departments, and he quotes from a decision of the Supreme Court in the Sinking-Fund cases—as I did in my brief for La Abra—that "one branch of the Government can not encroach on the domain of another without danger; that the safety of our institutions depends in no small degree on a strict observance of this salutary rule." But the court evidently did not think that this fundamental principle had any application to the case in question.

I do not need to invoke the power of Congress to any such extent as the court has asserted it in this case. It is enough for my purpose that the court has upheld the constitutionality of the jurisdictional act under which the suit of The United States *v.* La Abra was brought.

If Congress had the power to pass the act (and this is now beyond question) it has the power to enforce its execution and to direct the Attorney-General to revive the suit against Mrs. Birdsall, or to give her in some way her day in court as in that act prescribed. The jurisdictional act has not been carried out and the will of Congress has not been regarded so far as Mrs. Birdsall is concerned. It is no answer to say that the Court of Claims and the Supreme Court have decided that the award was obtained by fraud and that the claims of the company and its assigns have been barred and foreclosed. This foreclosure is binding only upon the defendants to the suit. Congress intended, and in express terms enacted, that the suit should be brought against the company, "its assigns, and all persons making any claim to the award or any part of it;" and the Attorney-General was informed by the company's answer, in response to his own prayer for discovery, of the assignment made by the company to John Birdsall and of the claim of his widow and administratrix thereunder to a portion of the fund.

Having absolute power over the award, Congress can now review what has been done and take such action as may seem proper to it in the premises. I do not need to argue that Congress can grant a new trial, although that is substantially what it did in respect to this award, which has been described as a final judgment of the highest court known to the law when it passed the act of December 28, 1892, which the Supreme Court has upheld. The Court of Claims says expressly that it tried the claim of La Abra Company against Mexico over again, and reviewed this international award in a collateral proceeding; and it appears on the face of its opinion that the Supreme Court has done this identical thing—none the less effectively because it has done it in a suit to determine whether the award was obtained in whole or part by fraud. All I need to argue is that the jurisdictional act, so far as Mrs. Birdsall's claim is concerned, has not yet been executed, and that until the Attorney-General revives the suit against her or gives her in some proper way her day in court, she is entitled to the protection of

Congress as part of this award—of this award, which, according to the Supreme Court, still subsists "between the Governments concerned," and is absolutely within the power of Congress.

So absolute is the power of Congress in the premises, according to this decision of the Supreme Court, that the United States may now agree with Mexico, or any other country, by treaty, to submit the personal claims of their citizens against the respective Governments to a court of arbitration, under the law of nations, and (as in this case) "solemnly and sincerely engage to consider the decision of the commissioners conjointly or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decision without any objection, evasion, or delay whatsoever;" and afterwards, when the money has been paid in satisfaction of any one of these individual decisions, Congress, by a legislative act, can return the amount, in whole or part, with the President's approval, or over his veto, to the debtor Government.[1]

It can not be said that when the court made this decision it failed to consider whether the question involved, i. e., whether the award was obtained by fraud or not, was justiciable; whether it involved legal rights susceptible of judicial determination and proper to be so determined. On the contrary, the court expressly decided that this question was justiciable; that (to quote from the court's opinion in this case) it was "a matter subjected to judicial investigation, in respect of which the parties assert rights;" and the court cited the apothegm of Mr. Justice Curtis in Murray *v.* Hoboken Land and Improvement Company (18 How., 272, 284):

> We do not consider Congress can either withdraw from judicial recognizance any matter which from its nature is the subject of a suit at the common law or in equity or admiralty; nor, on the other hand, can it bring under the judicial power a matter which from its nature is not a subject for judicial determination.

The court also said that—

> The question arises under the Constitution of the United States and a treaty made with the United States with a foreign country, is judicial in its nature, and one to which the judicial power of the United States is expressly extended.

Thus the court holds at one and the same time that this question (whether an international award upon an individual claim was or was not obtained by fraud) is "judicial in its nature," and nevertheless can be decided by Congress for itself, acting legislatively, as well as by the courts in the exercise of strictly judicial power.

Nor can it be said that the court overlooked the fundamental principle—on which Mr. Maury now relies—that this is a Government of limited powers conferred by the Constitution on the several departments, which must not encroach on each other's province. Indeed, the court seems to have held that after this case had run its course under

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[1] The Department is aware that since this case was argued in the Supreme Court the court of cassation, at Rome, reversing the courts below, has decided that an international award upon the claim of an Italian subject is "a diplomatic judgment" with which the Italian courts can not interfere, and to which the Italian Government is bound to give effect by paying over the amount awarded to the individual on whose claim the award was rendered. On this point that high court said: "The award was not carried into full effect by the transmission of the necessary amount for such indemnity to the Italian Government. The latter received the same for the purpose of delivering it to Cerruti, and such delivery was necessary to the execution of the convention." (MSS., original and translation, Dept. of State, in re Cerruti; see also Washington Law Reporter, vol. 27, No. 18, May 4, 1899, p. 293.)

the law of nations, and the treaty-making power had refused to reopen it by rejecting a convention for that purpose, whichever department of the Government got hold of it first might deal with it in such a way as would practically dispose of it forever.

> It is also clear [says the court, after asserting the absolute power of Congress over the award as aforesaid], that in the absence of any statute suspending the distribution of such money, the President could have ignored the charges of fraud and ordered the distribution to proceed according to the terms of the treaty and the award.

But we are in presence of a statute of Congress—the jurisdictional act of December 28, 1892—an express requirement of which in respect to the ascertainment of the legal rights of this administratrix remains unexecuted. No reason, bottomed in law or justice, has been alleged by the Attorney-General or his learned special assistant why this requirement of Congress should be disregarded, and this citizen of the United States deprived of her property without due process of law or the observance of this special act.

It is no objection to the revival of this suit that it will practically reopen the whole case. The whole case ought to be reopened, and it is matter of congratulation, in the interest of justice, that it can thus be reopened without asking either Congress or the court to grant a new trial. The original suit as prescribed by Congress has not yet been brought against Mrs. Birdsall, and the proper proceedings to determine her rights will furnish an opportunity to correct any mistakes of fact or law that have been heretofore made in the case.

Now I come to one of the "reasons of state" (the existence of which I suggested in my letter of the 9th instant), "why the President might well insist that Congress should take the responsibility of directing the return of the funds in question by a legislative act."

It may be confidently asserted that by the passage of the jurisdictional act Congress never intended to reverse the decision which was made by the President on the 5th of September, 1879, on the report of your predecessor, Mr. Evarts, after a long and thorough investigation of the evidence (old and new) in response to the request contained in the fifth section of the act of June 18, 1878. This Executive decision—that Mexico was liable in damages to the company—was communicated by direction of the President to the Mexican Government in writing, and, in the language of Chief Justice Nott, in his dissenting opinion in this case—

> was rendered unequivocal and unquestionable by the fact that the President, upon the recommendation of the Secretary, then proceeded to deal with the claim upon the basis that the responsibility of Mexico for the acts and inaction of its officers was a question finally settled.

This, as the learned Chief Justice pointed out, was done by paying to the company and its assigns their share of the three installments which had been received from the Mexican Government on account of the award. The President, whose power over the award, in the absence of any statute suspending the distribution of the fund, is expressly recognized by the Supreme Court (supra), went further than this, and decided, in the language of Mr. Evarts's report of September 3, 1879, that—

> The further consideration which the honor of the Government should prompt it to give to this award should confine the investigation to the question of a fradulent exaggeration of the claim.

And in April of the following year the President transmitted to Congress another report from Mr. Evarts (incorporating his earlier reports of August and September, 1879, and giving further reasons for his conclusion), in which he says:

> In the La Abra case a large amount of testimony was taken on both sides, the comparison and valuation of which was within the power of the commission, and the opinion of the umpire shows that it was carefully considered.

Upon consideration of this report and the President's action theron, the Judiciary Committee of the Senate reported unanimously that "it virtually determines the question submitted to the Executive department by the said fifth section (of the act of June 18, 1878) so far as that claim (La Abra company's) is involved."

This Executive decision is not discussed, or cited by the Supreme Court in its opinion in this case, although the conclusions of your distinguished predecessor, formally approved and signed by the President, September 5, 1879, and communicated in writing to the Mexican Government, seemed conclusive alike to the Judiciary Committee of the Senate, to the Senate itself at the time (1880), and to the learned Chief Justice of the Court of Claims in this case.

In the famous case of Marbury *v.* Madison, the court said that in the exercise of his constitutional powers the President "is accountable only to his country in his political character, and to his own conscience;" that there "exists and can exist no power to control that discretion;" and that in such matters "the decision of the Executive is conclusive." It was also said in Williams *v.* Suffolk Insurance Company (13 Pet., 319) that—

> It is not material to inquire, nor is it the province of the court to determine, whether the Executive be right or wrong; it is enough to know that in the exercise of his constitutional functions he has decided the question.

Now, in the exercise of his constitutional functions, and in response to a formal request of Congress, the President (by your predecessor, Mr. Evarts) carefully and exhaustively examined Mexico's charges of fraud and her so-called "newly discovered evidence," and made a formal and final decision, of which, as I have said, the Supreme Court takes no notice whatever. The court does say, however, in La Abra case (as already observed), that in the absence of any statute suspending the distribution of such money the President "could have ignored the charges of fraud and ordered the distribution to proceed according to the terms of the treaty and the award."

And in an earlier decision (Frelinghuysen *v.* La Abra Co., 110 U. S., 63) the same court held that no statute was needed to authorize the President either to make or withhold distribution or to inquire into Mexico's charges of fraud with a view to opening any or all of the awards. In that case the court said that the fifth section of the act of June 18, 1878, was and could be nothing but "a request," and that—

> It would have been just as competent for President Hayes to institute the same inquiry without this request as with it; and his action with the statute in force is no more binding on his successor than it would have been without it.

That act neither encroached upon nor enlarged his constitutional powers.

> All we decide [said the court] is that it was within the discretion of the President to negotiate again with Mexico in respect to the claims, and that as long as the two Governments are treating on the questions involved he may properly withhold from the relators their distributive shares of the money now in the hands of the Secretary of State.

As by the judgment of the Supreme Court in La Abra case the award still stands "between the Governments concerned," and the decree of foreclosure operates only on the claims of the defendants in the suit, the President is free to consider whether he will now, upon his own responsibility, overrule and condemn his predecessor's decision or not. The effect of President Hayes's decision and the consequences of reversing it are questions upon which the opinion of the Supreme Court is silent, although these questions were presented squarely in the record and in the argument before the court, as well as in the dissenting opinion of the learned Chief Justice of the Court of Claims.

As this case has been before the Department in one form and another for thirty years, and is unique in its history and of far-reaching importance, and as the questions to which I have alluded, with others to which I will briefly refer, are discussed more at length in my petition to the Supreme Court for a rehearing (which has been denied), I venture to inclose a printed copy of that petition and to express the hope that it may receive the careful attention of the Department, bearing, as it does, upon the matter of international arbitration, which is so important to the United States in its national character, as well as to the individual citizens concerned. What the President of the United States formally and officially did within his constitutional province, upon the advice of the Secretary of State, in response to a request of Congress, and after such a protracted and thorough investigation, is not to be ignored, still less to be reversed and reprobated, either expressly or by necessary implication, by any other department of the Government. But, as I have said, I have no idea that it was the intention of Congress to do any such thing; and it is now for the President to consider whether he will nullify and condemn his predecessor's decision in this case or await further developments before returning the funds to Mexico. The case is still open—as I contend—by the failure of the Attorney-General—not, however, the present learned incumbent of the office—to make Mrs. Birdsall a party as prescribed by the act of Congress, and this is a reason why the President should exercise the discretion with which he is invested (as it seems to me) independently of this consideration.

Another of the questions of state to which I referred in my letter of the 9th instant, may be put as follows:

Why should the President return these moneys to the Mexican Government at present, when for five years the Department of State has been using its good offices with that Government to expedite or secure some progress in the suit now pending in the courts of Durango between American citizens for the possession of the Candelaria mines, with their reduction works and appurtenances? This is the case in which the local Mexican mining official, in collusion with one of the defendants, gave him possession of the mines in his own right, under a false and fraudulent denouncement. This faithless and corrupt official was dismissed by the Mexican Government, and, on its advice, suit was commenced in the state court by the plaintiffs, as the true and lawful owners of the mines, for possession and an accounting, but the defendant, being in receipt of their immense revenues, has been able to avoid answering the complaint for all these years, although he should have answered within thirty days, when a receiver might have been appointed, and the plaintiffs are still deprived of the remedies provided by law. While justice is so delayed and denied to citizens of

the United States in the Mexican courts in respect to the Candelaria mines, why should the President be in any haste to return the undistributed portion of La Abra award to the Mexican Government —especially while Mrs. Birdsall's claim to a part of the fund has not been foreclosed or tried, as prescribed by Congress, and she has material evidence in support of the award, which was not produced in the suit to which she should have been, but was not made, a party.

It may also be confidently asserted that Congress never would have passed the jurisdictional act if it had known that the Mexican Government withheld and concealed the account books of the company from January, 1878 (when it received them from Granger), throughout the investigation made by Mr. Evarts in 1878–79, the deliberations of the Senate on the convention for a rehearing in 1882–86, and the examination by a subcommittee of the Senate, in 1888–89. During this long interval Mexico's agents and counsel were charging the company with having concealed or destroyed these records. The company's books were withheld and concealed by the Mexican Government until October, 1894 (two years after the passage of the act), because it was feared that they would sustain, as they do, not only the company's statement of its expenditures, but the testimony before the commission in regard to Exall's unlawful imprisonment in the pesthouse at Tayoltita, by showing the payment of the fine inflicted upon him by the local magistrate, Perez. (See Petition, pp. 14–18.) The court seems to have overlooked this evidence entirely, as well as the significant fact that although Perez was alive and accessible, and one of Mexico's witnesses directed the attention of the examining Mexican judge at San Dimas to the fact, the Mexican authorities refrained from examining him while the claim was pending before the commission, or in any of the subsequent proceedings.

The imprisonment of the company's superintendent shortly before he abandoned its property and business in Mexico was proved by Mexico's witnesses at the original trial, and admitted by the Mexican commissioner, Zamacona, before the commission, and the extraordinary scene in the local Mexican magistrate's court which preceded the imprisonment is set forth with graphic details in the letter book. But this seems to have escaped the notice of the court, as well as the equally significant and material fact that the letter book also contained proofs of the illegal seizure of a part of the company's land by the other local magistrate, Soto, in collusion with his fellow magistrate, Perez, and the erection of "tahonas," or reducing works, on the premises, to which the best ores of the company, stolen by the laborers, could be taken for reduction.

You will also see from the inclosed petition that the court not only seems to have overlooked a mass of material testimony which was before the umpire, and which is still unimpeached, like that of Soto, Chavarria, Galan, and Avalos (all Mexican citizens and amenable to Mexican law), but to have fallen into material errors of fact, such as the grave misapprehension that Colonel De Lagnel was describing the condition of the company's mines when he said in his letter of November 17, 1866, to the home office: "At present the mine is, I may say, bare of metal." (Petition, 52, 53.)

It was said (alas, how mistakenly) by a distinguished jurist in his place in the Senate, in regard to the contract that Mexico made with

General Slaughter in March, 1877, in which he agreed for a contingent compensation "to undertake the proof of fraud" in this case (although he confessed he knew nothing about it) that—

> There is not a respectable chancellor of the English-speaking race in Christendom who, if such a contract as that were made to appear at the bar of his court, would not throw out any case that came there with it.

The contract between Granger and the Mexican Government, under which the so-called newly discovered evidence was obtained, was equally obnoxious and abhorrent to municipal and international law.

But the court seems not to have felt at liberty to consider Mexico's conduct at all in this matter, neither her prolonged concealment of the company's books nor the inducement she gave to Granger to tamper with the records, nor her failure to prosecute her own distinguished citizens, whom she charged with perjury in this case.

None but an iniquitous cause could possibly have been supported, as this scheme of Mexico and her agents for the subversion of this award has been from the beginning by misrepresentations and perversions of fact so numerous, so adroit, and so persistent that they have created an atmosphere of which even judges may unconsciously have been the victims.

I beg that you will not think that I am rearguing this case out of court after an adverse decision. I am only trying to show how fortunate it is in the interest of justice that the case may be regarded as still open by reason of the Attorney-General's failure to make Mrs. Birdsall a party, and that there are the gravest reasons why the President should decide to retain the funds until further action shall have been taken by Congress.

I have the honor to be, sir, your obedient servant,

CRAMMOND KENNEDY.

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